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MENGAWARTI SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

B

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
LOW HOP BING JCA
VINCENT NG JCA
[CIVIL APPEAL NO: W-01-83-97]

C

10 APRIL 2009

REVENUE LAW: *Income tax - Assessment - Deduction - Whether land-alienation costs allowable as deductions from income - Finding of primary facts by Special Commissioners - Whether could be overruled or*

D

supplemented by High Court - Principles applicable - Incurrence of expenditures - Income Tax Act 1967, s. 33(1)

REVENUE LAW: *Income tax - Deduction - Whether land-alienation costs allowable as deductions from income - Finding of primary facts by Special Commissioners - Whether could be overruled or supplemented by*

E

High Court - Principles applicable - Incurrence of expenditures - Income Tax Act 1967, s. 33(1)

REVENUE LAW: *Income tax - Special Commissioners - Deciding order dismissing taxpayer's claims for deduction - Finding of primary*

F

facts by Special Commissioners - Whether could be overruled or supplemented by High Court - Principles applicable

REVENUE LAW: *Income tax - Assessment - Deduction - Whether land-alienation costs allowable as deductions from income - Capital*

G

expenditures - Incurrence of expenditures - Income Tax Act 1967, s. 33(1)

This was an appeal by the appellant taxpayer against the decision of the High Court affirming the deciding order of the Special

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Commissioners of Income Tax ('SC') dismissing the taxpayer's claims for deduction of two amounts *viz*. RM767,918 and RM63,442 from the taxpayer's gross income for two years of assessment *viz*. 1982 and 1984 respectively. The taxpayer, a housing developer, had applied to the State Government of

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Melaka ('State Government') for alienation of 250 acres of leasehold land for housing development purposes. The State Government approved the application, and the taxpayer had to

pay the premium and other statutory charges ('land-alienation costs') within two months from the date of receiving the notification. The taxpayer subsequently entered into an agreement with another housing developer ('Masa Merdeka'), with Masa Merdeka paying consideration amounting to RM900,000 to the taxpayer. The sole issue in this appeal requiring determination was whether the land-alienation costs were allowable as deductions from the income of RM900,000.

Held (dismissing the appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The SC had found no evidence at all of the existence of the payment of the land-alienation costs by the taxpayer to the State Government. In applying the established principles set out in *Chua Lip Kong v. Director General of Inland Revenue*, the finding of the SC (that there was no evidence of the date and actual amount paid to the State Government) was unassailable; the High Court could neither overrule nor supplement it. Notwithstanding that, the High Court made a finding that directly contradicted the SC's finding, holding that the taxpayer had paid the sum of RM831,340 to the State Government in 1980. It assailed, overruled or supplemented the SC's finding of primary facts, contrary to the well-known principles set out by Lord Diplock in *Chua Lip Kong (supra)*. In this regard, the High Court had erred. The SC's finding, as triers or finders of facts, was to be preferred; its deciding order, being free from any error, should be affirmed. *Chua Lip Kong v. Director General of Inland Revenue* (foll). (paras 22, 23, 24 & 25)

(2) Even accepting the finding of the High Court that there was evidence the taxpayer had in 1980 paid the land-alienation costs to the State Government, the judge was correct in law as the land-alienation costs were capital expenditures for acquiring the land, and not revenue expenditures. In any event, those expenditures were not wholly and exclusively incurred in the production of the taxpayer's gross income of RM900,000, nor were they incurred in the period when the taxpayer received the income in 1981 and 1983. Clearly, such requirement that all outgoings and expenses must have been wholly and exclusively incurred during the said period is expressly contained in s. 33(1) of the Income Tax Act 1967. (para 26)

(3) The SC and the High Court judge were correct in arriving at their respective conclusions, *albeit* on different grounds. The answer to the sole issue for determination was therefore in the negative. The taxpayer's appeal had no merits. (para 27 & 28)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh perayu pembayar cukai terhadap keputusan Mahkamah Tinggi mengesahkan perintah yang menentukan oleh Pesuruhjaya Khas Cukai Pendapatan ('PK') menolak tuntutan pembayar cukai untuk tolakan dua amaun, iaitu, RM767,918 dan RM63,442 daripada pendapatan kasar pembayar cukai bagi dua tahun taksiran, iaitu, 1982 dan 1984 masing-masing. Pembayar cukai, yang merupakan satu pembangun perumahan, telah memohon ke Kerajaan Negeri Melaka ('Kerajaan Negeri') untuk pemberimilikan 250 ekar tanah pegangan pajak bagi tujuan pembangunan perumahan. Kerajaan Negeri meluluskan permohonan itu, dan pembayar cukai dikehendaki membayar premium dan caj-caj statutori lain ('kos pemberimilikan-tanah') dalam masa dua bulan dari tarikh penerimaan notifikasi. Pembayar cukai kemudiannya memasuki satu perjanjian dengan satu pembangun perumahan yang lain ('Masa Merdeka'), dengan Masa Merdeka membayar balasan sebanyak RM900,000 kepada pembayar cukai. Isu tunggal dalam rayuan semasa yang perlu ditentukan ialah sama ada kos pemberimilikan-tanah boleh dibenarkan sebagai tolakan daripada pendapatan sebanyak RM900,000 itu.

Diputuskan (menolak rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) PK tidak menemui apa-apa keterangan mengenai kewujudan pembayaran kos pemberimilikan-tanah oleh pembayar cukai kepada Kerajaan Negeri. Dengan menggunakan prinsip-prinsip mantap yang telah dinyatakan dalam *Chua Lip Kong v. Director General of Inland Revenue*, dapatan PK (bahawa tiada keterangan tentang tarikh dan amaun sebenar yang dibayar kepada Kerajaan Negeri) tidak dapat disangkal; Mahkamah Tinggi tidak boleh menolak ataupun menambah akannya. Walaupun begitu, Mahkamah Tinggi telah membuat suatu dapatan yang bercanggah betul-betul dengan dapatan PK, iaitu memutuskan bahawa pembayar cukai telah membayar jumlah RM831,340 kepada Kerajaan Negeri pada tahun 1980. Ia

menyangkal, menolak dan menambah dapatan fakta-fakta primer PK, yang bercanggah dengan prinsip-prinsip terpakai yang telah dinyatakan oleh Lord Diplock dalam *Chua Lip Kong (supra)*. Berhubungan perkara ini, Mahkamah Tinggi telah khilaf. Dapatan PK, sebagai pencuba atau pencari fakta-fakta, lebih berpatutan; perintah yang menentukannya, bebas daripada apa-apa kekhilafan, seharusnya diesahkan. *Chua Lip Kong v. Director General of Inland Revenue* (diikuti).

(2) Meskipun menerima dapatan Mahkamah Tinggi bahawa terdapat keterangan pembayar cukai telah dalam tahun 1980 membayar kos pemberimilikan-tanah kepada Kerajaan Negeri, hakim betul di sisi undang-undang kerana kos pemberimilikan-tanah ialah perbelanjaan modal bagi memperolehi tanah itu, dan bukan modal hasil. Walau apa pun, perbelanjaan itu tidak disebabkan sepenuhnya dan secara eksklusif dalam penghasilan pendapatan kasar sebanyak RM900,000 pembayar cukai, ataupun disebabkan dalam jangka masa apabila pembayar cukai menerima pendapatan itu pada tahun 1981 dan 1983. Dengan jelasnya, keperluan sebegitu bahawa semua belanja pasti dan perbelanjaan mesti sepenuhnya dan secara eksklusif disebabkan semasa jangka masa itu dikandungi dengan ekspres dalam s. 33(1) Akta Cukai Pendapatan 1967.

(3) PK dan hakim Mahkamah Tinggi betul dalam mencapai kesimpulan mereka masing-masing, walaupun atas alasan-alasan yang berbeza. Jawapan kepada isu tunggal yang perlu ditentukan ialah, oleh itu, secara negatif. Rayuan pembayar cukai tidak ada apa-apa merit.

Case(s) referred to:
Chua Lip Kong v. Director General of Inland Revenue [1982] 1 MLJ 235 236 ***(foll)***
Edwards (Inspector of Taxes) v. Bairstow and Another [1956] AC 14 ***(refd)***
UHG v. Director General of Inlands Revenue [1974] 2 MLJ 33 ***(refd)***

Legislation referred to:
Income Tax Act 1967, s. 33(1)

For the appellant - Dato' WSW Davidson (Francis Tan & HL Wong with him); M/s Azman Davidson & Co
For the respondent - Neng Juliana Ismail (Noor Kamaliah & Mohamad Japeri with her); FCs

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R1-14-11-95]

Reported by Suresh Nathan

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JUDGMENT

Low Hop Bing JCA:

Appeal

B **[1]** On 10 June 1997, the Kuala Lumpur High Court affirmed the deciding order of the Special Commissioners of Income Tax ("the Special Commissioners") in dismissing the claims by the appellant ("the taxpayer") for deduction of two amounts *viz* RM767,918 and RM63,442 from the taxpayer's gross income for C two years of assessment *viz* 1982 and 1984 respectively.

[2] This is the taxpayer's appeal against the decision of the High Court.

D **Factual Background**

[3] The taxpayer's memorandum and articles of association state that the main objective of the taxpayer, incorporated on 20 January 1979, is that of a housing developer.

E **[4]** The taxpayer had applied to the State Government of Melaka ("the State Government") for alienation of 250 acres of leasehold land for the purpose of housing development. The State Government approved the application *vide* notification dated 1 February 1980. The taxpayer had to pay the premium and other F statutory charges, amounting to RM831,340 (collectively "the land-alienation costs") within two months from the date of receiving the notification.

[5] On 5 March 1980, the taxpayer entered into an agreement G with another housing developer, Masa Merdeka Sdn. Bhd ("Masa Merdeka") to develop the land, at a consideration of RM3.5million to be paid by Masa Merdeka to the taxpayer, as follows:

(1) RM850,000, before 1 April 1980 ie the expiry date of the notification dated 1 February 1980; and

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(2) The balance sum of RM2,650,000, to be paid proportionately by reference to the area of the land developed.

[6] The notification was subsequently replaced by another I notification, dated 16 May 1980, which required the taxpayer to pay an increased amount of RM858,050 for the alienation of the land.

[7] A qualified title was issued by the State Government on 18 September 1980.

[8] On 31 December 1980, the taxpayer and Masa Merdeka entered into another agreement which varied the consideration from RM3.5million to RM900,000 ("the 31 December 1980 agreement") payable as follows:

(1) RM831,340 within two weeks from the date of the letter of approval from the land administrator of Melaka Tengah; and

(2) Balance sum RM68,660, to be paid upon completion of the housing estate.

[9] The taxpayer's balance sheet carried, *inter alia*, the following entries:

	Period	Item	Amount
1.	For the year ended 31 December 1980	(a) Land for Development	RM831,340
		(b) Advanced (unsecured)	RM864,503
2.	For the year ended 31 December 1981	(a) Land for development	RM831,340
		(b) Advance (unsecured)	RM864,600
3.	For the year ended 31 December 1982	(a) Land for Development	Increased to RM858,050 from RM831,340
		(b) Advance (unsecured)	Increased to RM900,000 from RM864,600 and reclassified as "Deferred Income"

[10] On 8 July 1983, a supplemental agreement was entered into between the taxpayer and Masa Merdeka, providing for the payment by Masa Merdeka to the taxpayer of an additional consideration of 50 sen per sq ft when the buildings are completed and sold by Masa Merdeka.

[11] The taxpayer was assessed to tax as follows:

Year of Assessment	Tax
1982	RM831,340
1984	RM68,600

[12] Being dissatisfied, the taxpayer lodged an appeal with the Special Commissioners.

Issues Before The Special Commissioners

[13] Two issues raised for determination by the Special Commissioners were:

(1) Was the sum of RM900,000 received by the taxpayer as "advance" or "income"? and

(2) If the sum of RM900,000 were received as "income", should the land-alienation costs be allowed as deductible expenses?

[14] In essence, the Special Commissioners' findings of facts and deciding order are to the following effect:

(1) The sum of RM900,000 was not "advance" but "income" ie profit from the sale of development rights and hence assessable to tax under the Income Tax Act 1967; and

(2) The land-alienation costs should not be allowed as deductible expenses against the income of RM900,000 as there was no evidence of the date and the actual amount paid to the State Government.

Issue Before The High Court

[15] Before the High Court, the taxpayer abandoned the contention that the sum of RM900,000 represented "advance" and conceded that it was "income", but continued to assert that the land-alienation costs were deductible against the income of

RM900,000 ("the income"). Hence, the only issue before the High Court was whether the land-alienation costs were deductible from the income.

[16] The High Court rejected the taxpayer's assertion and held that the land-alienation costs:

(1) were capital expenditures for the acquisition of the land; and

(2) were not wholly and exclusively incurred in the production of the income, nor incurred in the period when the taxpayer received the income.

Issue Before This Court

[17] The sole issue raised for determination by this court is whether the land-alienation costs were allowable as deductions from the income.

Finding Of Facts

[18] Ms Neng Juliana Ismail (assisted by Ms Noor Kamaliah and Mr Mohamad Japeri) submitted for the Director General of Inland Revenue ("the Revenue") that the findings of primary facts by the Special Commissioners are unassailable and can neither be overruled nor supplemented by the High Court. For this proposition, the Revenue cited *Chua Lip Kong v. Director General of Inland Revenue* [1982] 1 MLJ 235, 236 PC.

[19] Taxpayer's learned counsel Dato' WSW Davidson (Mr Francis Tan and Mr HL Wong with him) contended that the Revenue's submission is incorrect as *Chua Lip Kong, supra,* makes a distinction between the findings of primary facts and inferences drawn from primary facts, and relied on *Edwards (Inspector of Taxes) v. Bairstow and Another* [1956] AC 14, 29 HL.

[20] I would first extract the essential principles expounded in the speech of Viscount Simonds in the House of Lords in *Edwards v. Bairstow, supra,* as follows:

(1) A pure finding of fact may be set aside if it appears that the Commissioners have acted without any evidence, or upon a view of the facts which could not reasonably be ascertained;

(2) The primary facts may not reasonably be supported if:

A (a) They do not justify the inference or conclusion which the Commissioners have drawn; or they lead irresistibly to the opposite inference or conclusion; or

(b) The finding is perverse.

B **[21]** *Edwards v. Bairstow, supra,* was followed in *Chua Lip Kong, supra,* by Lord Diplock in delivering the advice of the Privy Council. His Lordship set out the following relevant established principles:

(1) In every case stated for the opinion of the High Court, the C Special Commissioners should state clearly and explicitly the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded;

D (2) Findings of primary facts by the Special Commissioners are unassailable, and cannot be overruled or supplemented by the High Court;

(3) Occasionally, the primary facts may be insufficient to enable E the High Court to decide the question of law sought to be raised by the Case Stated; in that event, it will be necessary for the Case to be remitted to the Commissioners for further findings;

F (4) It is the primary facts so found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved";

(5) From the primary facts admitted or proved, the Commissioners are entitled to draw inferences; such inferences may themselves G be inferences of pure fact, in which case they are as unassailable as the Commissioners' findings of primary facts; but they may be, or may involve (and very often do) assumptions as to the legal effect or consequences of primary facts, and there are always questions of law upon which it is the function of the H High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shewn to have proceeded upon some erroneous assumptions as to the relevant law; and

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(6) In a case stated, the Special Commissioners should set out, in a separate paragraph from that which contains their findings of primary facts, such inferences as they have drawn from those primary facts in the process of arriving at their decision, so that the court may be able to identify the true nature of the inferences *viz* whether they are pure inferences of fact or whether they involve assumptions as to the legal effect or consequences of fact; and, in the latter event, what those assumptions were.

(See also *U.H.G. v Director General of Inlands Revenue* [1974] 2 MLJ 33, 34G).

[22] Reverting to the mainstream of the instant appeal, it needs to be noted that the Special Commissioners had found no evidence at all of the existence of the payment of the land-alienation costs by the taxpayer to the State Government. This crucial finding is to be found at p. 45 of the appeal record and merits reproduction as follows:

> In fact, no evidence was adduced to indicate exactly how much and when the land alienation costs had actually been paid by the Taxpayer to the State Government.

[23] In applying the above established principles set out in *Chua Lip Kong, supra*, I am of the view that the Special Commissioners' finding (that there is no evidence of the date and actual amount paid to the State Government) is unassailable; neither can it be overruled nor supplemented by the High Court.

[24] Notwithstanding that, the High Court found as follows:

> But according to the evidence, only the sum of RM831,340 was paid by the Appellant to the State Government. This must be in pursuance to the amount stated in the notification of 1st February 1990 mentioned earlier. This amount must have been paid in 1980 for the document of title was issued on 18th September 1980. (See p. 23 of the appeal record).

[25] The finding of the High Court is in direct contradiction to the Special Commissioners' finding. The High Court has assailed, overruled or supplemented the Special Commissioners' finding of primary facts, contrary to the well-known principles set out by Lord Diplock in *Chua Lip Kong, supra*. In this regard, the High Court has erred. The Special Commissioners' finding, as triers or finders of facts, is to be preferred. The Special Commissioners' deciding order, being free from any error, should be affirmed.

[26] For completeness, even by accepting the finding of the High Court that there was evidence that the taxpayer had in 1980 paid the land-alienation costs to the State Government, the learned judge was correct on the law as the land-alienation costs were capital expenditures for acquiring the land, and not revenue expenditures. In any event, these expenditures were not wholly and exclusively incurred in the production of the taxpayer's gross income of RM900,000, nor were they incurred in the period when the taxpayer received the income in 1981 and 1983. Clearly, such requirement that all outgoings and expenses must have been wholly and exclusively incurred during the said period is expressly contained in s. 33(1) of the Income Tax Act 1967 which reads as follows:

> 33(1) Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses **wholly and exclusively incurred during that period** by that person in the production of gross income from that source, … (emphasis added).

Conclusion

[27] The Special Commissioners and the High Court judge were correct in arriving at their respective conclusions, *albeit* on different grounds.

[28] The answer to the sole issue for determination is therefore in the negative. The taxpayer's appeal, being without merits, is dismissed with costs. Deposit to the Revenue (respondent) on account of taxed costs.

[29] My learned brothers, Mohd. Ghazali bin Mohd Yusoff, JCA and Vincent Ng Kim Khoay, JCA have read this judgment in draft and have expressed their agreement with it to become the judgment of the court.

[30] His Lordship Vincent Ng Kim Khoay, JCA has also complemented as follows:

> (1) I would however wish to make a further addition. In my view the landmark House of Lords case of *Edwards (Inspector of Taxes) and Baistow and Another* [1956] AC 14, 29 HL has established the following principles which are now pretty well settled:

(a) a distinction must be made between pure findings of primary facts and inferences drawn from such findings of primary facts;

(b) if the findings of primary facts are equivocal or insufficient to enable the High Court to decide the question of law sought to be raised in the case stated it is incumbent on the Court to remit to the Commissioners for further findings;

(c) the Court is precluded from setting aside or overruling a pure finding of fact which is neither equivocal nor insufficient;

(d) however, the Court may set aside or overrule a pure finding of fact if such finding is clearly perverse or ill-founded.

(2) The crucial point here is that the Special Commissioners had found no evidence at all of the existence of the payment of the land-alienation costs. This, in my view, is a pure, and indeed, clear and unequivocal finding of fact which is neither a perverse nor ill-founded finding. As such, being the triers of facts, the Special Commissioners' finding is unassailable by the High Court. In the event, the tax payer's appeal must be dismissed with costs.